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IN THE

Supreme Court of the United States

October Term, 1946

Nos. 759 and 760

THE UNITED STATES OF AMERICA,

Petitioner,

against

UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, and JOHN L. LEWIS, individually and as President of the United Mine Workers of America,

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

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EDWARD J. MALAMENT.

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PETITION FOR PERMISSION TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The undersigned, as general counsel for the National Maritime Union of America, respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae with the consent of the attorneys for the petitioner and respondents.

The National Maritime Union of America alleges that it is an unincorporated membership organization, organized and existing under and by virtue of the laws of the State of New York, for the purpose of improving the conditions of workers employed in the American Merchant Marine.

It has a membership of more than 90,000 seamen. Having written collective bargaining agreements with more than 125 private companies, it maintains branches in all of the principal ports along the Atlantic, Gulf and Pacific coasts including a branch in Puerto Rico and Hawaii.

The issue tendered in the instant case—the exemption of Government from the operation of the Norris-La Guardia Anti-Injunction Act—is of profound concern to all organized labor. The narrow issue may appear to be one of legislative intent in the case of a particular statute. Actually, it cuts far deeper. Increased government intervention in industry, whether as owner, manager or creditor, must be anticipated. The process has already begun. It will be necessarily accelerated in order to meet the competition of government-controlled industry abroad. The basic question is therefore, not one of legislative construction, but the impact of government supervision of industry upon labor's right to organize and bargain collectively. This is probably the first of many such cases that will come before this Court. It warrants, therefore, the most thorough analysis of the interdependence and participation by the state in industry.

The Petitioner desires to bring to the Court's attention the possible implications of an affirmance insofar as it would affect the merchant seamen of America. It desires, also, to illustrate in the case of the merchant marine, a pattern of government participation in business which would permit permanent interference by the Government with collective bargaining in this and other industries.

The federal government has exercised a predominant proprietary interest in the American merchant marine since its inception. As the accompanying brief will show, this interest will undoubtedly continue in the future. To date, marine unions have enjoyed the same rights as shoreside unions. Notwithstanding, the great majority of vessels were government owned or operated for the account of the government; labor management relations in the ma-

rine industry have been governed by the same laws without destruction to private or government ownership. Under these laws the American merchant marine has witnessed tremendous improvement in self-organization, wages and working conditions of merchant seamen. In a single decade, the acceptance of collective bargaining between labor and management has become firmly established.

These gains are now threatened by the decision below. If affirmed the door is opened to the immediate disruption of whatever progress has been made toward industrial stability in this or any other industry where the government may be persuaded to step in and take over. Unless reversed, industry will be encouraged to invoke government aid in order to escape responsibility. The coal miner, the merchant seaman, the factory worker will not understand or accept lightly the forfeiture of hard-won gains, should he, for reasons beyond his control, find himself in a government controlled industry.

WHEREFORE, your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae.

WILLIAM L. STANDARD,
Attorney for Petitioner,
Office and Post Office Address,
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New York City.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:
SOUTHERN DISTRICT OF NEW YORK,

WILLIAM L. STANDARD, being duly sworn, deposes and says that he is attorney for the petitioner herein and is familiar with all of the facts set forth in the petition herein. That the facts therein stated are true and correct to deponent's knowledge and information.

WILLIAM L. STANDARD.

Sworn to before me this
13th day of January, 1947.

RUTH H. SASLOW,
Attorney and Counselor at Law,
Residing in Kings County.
Kings Co. Clks. No. 56, Reg. No. A599-S-7.
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Term Expires March 30, 1947.

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BRIEF FOR NATIONAL MARITIME UNION OF AMERICA, CIO, *AMICUS CURIAE*

The Issue

The District Court, in an opinion which makes no reference to the war powers of the Government and which does not suggest that it was written to defend the exercise of such powers, has declared that the United States is not bound by the public policy expressed in the Norris-LaGuardia Act. The Court has permitted the United States to inject itself in a labor dispute and to obtain an order restraining employees from refusing to work.

It is doubtful that even the exigencies of war could condone such a radical upheaval of private rights and relation-

ships.[1] But the decision goes far beyond a construction of the war powers of the Government. It is broad enough to allow similar action to be taken in any labor dispute, whether in time of peace or in war, whenever the United States can show some kind of interest, whether as owner, manager or even creditor.

The real issue, therefore, is whether private industry may, through the medium of a governmental agency, do what it has no right to do directly—invoke the equity powers of the federal courts to break strikes.

The Scope of the Problem

The role of the Government in business is increasing. The National Maritime Union voices no opinion about the desirability of this development. It is a fact which compels attention now and which is apparently the necessary consequence of economic forces. The activities of the Tennessee Valley Authority,[2] the Inland Waterways Corporation[3] and the Reconstruction Finance Corporation[4] illustrate this tendency. The United States Maritime Commission,[5] as were its predecessor agencies, is the most important proprietary interest in the shipping industry.[6]

The National Maritime Union, representing as it does the Nation's largest group of organized seamen, feels deep concern over the effect of the District Court's decision upon the collective bargaining rights of merchant seamen.

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[1] *Ex Parte Milligan*, 71 U. S. 2.

[2] Tit. 16 U. S. C. A. sec. 831 et seq.

[3] Tit. 49 U. S. C. A. sec. 151.

[4] Tit. 15 U. S. C. A. sec. 601 et seq.

[5] 46 U. S. C. A. sec. 1.

[6] *The Postwar Outlook for American Shipping*, p. 35. Report submitted to the United States Maritime Commission by the Postwar Planning Committee, June 15, 1946.

The economic forces at work in the shipping industry have for generations driven it in the direction of greater and greater governmental control. Thus far the rights of maritime labor have not been impaired, but the principles enunciated by the District Judge places in serious question their continued preservation.

The Court below approached its decision in very simple terms:

> "The Court thinks that undoubtedly under the general rules which the Court has spoken of, the Norris-LaGuardia Act did not and does not apply; and following that opinion on the part of the Court, the Court had the same rights that the Court would have had prior to the passage of the Norris-LaGuardia Act and the Clayton Act."

To declare that the sovereign was not affected by statutes which would have denied relief to a private litigant did not, of course, take the problem before the Court. By what right did the sovereign acquire status as plaintiff in a court of equity? To this, the opinion suggests the answer:

> "In this case, what society, what the sovereign power, was endeavoring to do was to hold a matter involving the public interest, a matter involving a potential public calamity by an entity which had been given power by the sovereignty itself, the labor union, from taking the contemplated action, which, as I said before, would amount to a public calamity, until there would be a judicial determination of whether it had the right to take such action."

This was not, of course, the theory of the complaint or even of the Court's findings. There the right to relief was predicated upon interference with Government possession pursuant to Executive Order. The opinion goes far beyond the fact of possession. It implies that whenever a strike leads to serious economic disturbance, the United States may enter the dispute on the side of the employer and aid him by obtaining an order restraining the strike.

But even the narrow basis, alleged in the complaint, places in jeopardy the basic rights of employees. Inferentially, it must mean that whenever the United States is associated with the operation of an otherwise private enterprise, employees lose their right to strike, since the Government may seek and obtain an injunction to prevent the strikers from interfering with the Government's interest.

The path is thus charted for employers who are financed by government funds or who are doing business under the supervision of, or on behalf of, the Government and who wish to avoid dealing with organized labor. If they can induce the Government to act in order to protect its interest, strikes can be forbidden, picketing enjoined, workers deprived of the effective means to bargain collectively.[7]

Government and the Maritime Industry

1. The Extent of Government Control.

The impact of the theory enunciated by the Court below, upon labor relations, is almost incalculable. Maritime employees, particularly, are confronted by an imminent threat to their freedom of action, for the industry has long been one in which the United States, directly or through various instrumentalities, has played a dominant role.

Economic factors brought our merchant marine almost to the point of dissolution by the beginning of the century. Only slightly more than 8 percent of our foreign trade was transported in ships flying the flag of the United States in 1910.[8] The adequacy of our merchant marine had degenerated to the point where we were paying mail subsidies to foreign vessels.[9]

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[7] *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209.

[8] Paul Maxwell Zeis, *American Shipping Policy*, 15.

[9] Winthrop L. Marvin, *The American Merchant Marine*, 423.

For many years Congress searched unsuccessfully for some formula which would permit the establishment of a prosperous merchant marine under private ownership. Yet, as early as 1907, it was suggested that no such solution was possible, and that there was no real alternative to government ownership.[10]

The first World War brought an end to debate for the time being. The shipping industry in private hands was unable to perform the services needed by the Government. Reluctantly, but nevertheless inevitably, the idea of government ownership and control became accepted as the only means available to insure a merchant marine capable of meeting the exigencies of war. The United States Shipping Board was established. It was empowered to construct vessels and to operate them if citizens could not be found capable and willing to do so.[11]

Despite the express intention to return the merchant fleet to private ownership after the war, Government participation did not abate after the end of hostilities. Various means were used to attract private capital. To some extent, ships were operated through government corporations such as the Emergency Fleet Corporation;[12] in the main, however, private operators were engaged under managing agent agreements to operate for the account of the United States.[13]

Even the number of vessels directly owned by the United States did not determine the extent of financial interest in the merchant fleet. As Senator Black reported in 1935, following a Senate investigation into ocean mail contracts:[14]

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[10] Zeis, op. cit., 51.

[11] Ibid., 86-94. The Shipping Board was created by the Act of September 7, 1916, c. 451, sec. 3.

[12] *Sloan Shipyards Corp. v. United States Shipping Board*, 258 U. S. 549, 565, 566.

[13] Zeis, op. cit., 112, 113.

[14] *Investigation of Air Mail and Ocean Mail Contracts*, Report No. 898, 74th Cong. 1st Sess. p. 3.

> "Even the merchant marine we have cannot fairly be described as privately owned. When all mail contractors (except for the Industrial United Fruit Co.) are considered, it is found that the Government has 'invested' *by loans and ship-sale mortgages* on contractors' vessels 1.39 times the stockholders' interest in their companies. This investment by the Government excludes more than $120,000,000 so-called 'mail pay' and a similar expenditure under the Managing Operator Agreements, which *Government money* is responsible for the major portion of the operators' present capital." (Italics in original.)

The conclusion drawn by the Senate Committee from the financial structure of the industry at that time is found in the recommendation "that whenever the taxpayers' money is invested in ships or shipping enterprises, the Government retain full and complete ownership and control." [15]

The adoption of the Merchant Marine Act of 1936 [16] did not result in any appreciable modification of the financial structure of the shipping industry. Congress declared its intention that ships be privately operated "insofar as may be practicable" [17] but that objective was not realized to any real extent. The Maritime Commission, after an exhaustive survey of the maritime scene, admitted: [18]

> "We like to think of shipping as an example of individual initiative, sustained by investments and capable of being operated at a profit. In practice, however, the industry requires substantial Government support to survive. That entails some measures of Government control, which in turn means inflexibility, curtailment of investment and perhaps in the end an increased need for subsidies."

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[15] Ibid., p. 40.

[16] Tit. 46 U. S. C. A. sec. 1101 et seq. Act June 29, 1936, c. 858.

[17] Tit. 46 U. S. C. A. sec. 1101.

[18] *Economic Survey of the American Merchant Marine*, p. 1.

The experience of the Commission up to the outbreak of the Second World War amply confirmed that conclusion. Without subsidies, the fleet could not survive, and even with subsidies, it was found necessary for the Government to operate a good number of vessels through managing agents.[19]

The Second World War brought with it complete government control of shipping. The United States took possession of almost all vessels already in operation either by purchase or bareboat charter. Thousands of new vessels were built. During the war, operation of the fleet was conducted, in the main, by private citizens acting as General Agents for the United States and for the account of the United States.[20]

With the end of the war and with the adoption of the Ship Sales Act of 1946,[21] a program looking toward a privately operated merchant marine was again conceived. But the Maritime Commission is not too sanguine about the prospects of fulfilling this program.[22]

> "Government-owned vessels should be disposed of to private interests insofar as private interests are willing and able to absorb them. It is quite likely, however, that a sizeable number of vessels will remain in Government hands. If the Reserve fleet is taken into consideration, the number of vessels to which the Government retains title may well amount to two or three times those owned by private companies."

In fact, it envisages the possibility that private operation of the shipping industry may have to be abandoned.[23]

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[19] For examples of the manner in which these operations were conducted see: *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575; *Quinn* v. *Southgate-Nelson Corp.*, 121 Fed. (2) 190 (CCA 2), cert. den. 314 U. S. 682.

[20] *Hust* v. *Moore-McCormack Lines, Inc.*, 90 Law. Ed. 1220.

[21] Act March 8, 1946, ch. 82.

[22] *Postwar Outlook for American Shipping*, supra, p. 35.

[23] Ibid., 36.

"The trend toward national fleets abroad may make it necessary for the United States to modify its policy. Some of the fleets with which we shall have to compete are Government-owned and operated. Others are quasi-public enterprises. Only a few are entirely private in character. If foreign countries run their merchant marines as national undertakings, it is obvious that we may be forced to do likewise in order to survive."

At the end of November, 1946, the United States owned 3,438 merchant ships. Total sales, both to citizens and to non-citizens stood at 717; 653 applications were on file pending decision. The number of ships sold to citizens was only 253; the others were sold to foreign governments and to foreign citizens. Of the pending applications, only 143 were from American citizens.[24] It is obvious that the transfer of ships to private operations is not proceeding at a rate to justify the expectation that the end of government operation is visible or even contemplated. Even the coastwise trade, normally the healthiest section of the industry, is essentially a governmental enterprise today, with most of the vessels operated by the Maritime Commission through its agents.[25]

2. The Rights of Maritime Labor.

Despite the dependence of the industry upon government participation, maritime employees have always, both in time of war and peace, exercised their rights to organize, to bargain collectively and to strike if need be. Those rights have not been challenged, whether the maritime unions were representing seamen on private or government vessels. During the pre-war operations by the Maritime Commission, the National Labor Relations Board repeatedly rejected the contention that employees on vessels operated under a managing agent's agreement for

[24] United States Maritime Commission Release, Dec. 20, 1946.

[25] United States Maritime Commission Release, November 30, 1946.

the Commission were employees of the United States and, in consequence, without remedy under the Wagner Act. *International Freighting Corp.*, 3 N. L. R. B. 692; *Southgate-Nelson Corporation*, 3 N. L. R. B. 535; *Cosmopolitan Shipping Co., Inc.*, 2 N. L. R. B. 759.

During wartime operations, when for obvious reasons it was important to maintain a stabilized labor policy, the War Shipping Administration, charged with control over merchant ship operation, invited the National Labor Relations Board to apply the provisions of the Wagner Act to general agency ships. The Board accepted the suggestion.[26] Throughout the war and since the maritime unions have dealt with the General Agents in all collective bargaining. Neither the War Shipping Administration nor the Maritime Commission has interfered, although the United States has by far the largest financial interest in the fleet.[27]

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[26] The agreement was made by an exchange of letters between Admiral Land, Administrator of the War Shipping Administration (dated October 20, 1942), and Chairman H. A. Mills of the National Labor Relations Board (dated October 26, 1942).

[27] cf. Clarification Act of 1943, Act of March 24, 1943, c. 26. Senate Report No. 62, February 22, 1943 (Senate Committee on Commerce), expressed gratification that the Administration had been able to utilize private agencies so successfully under war conditions, and commented that the agency agreements provided that crews were to be made available "through the usual channels and in accordance with the customary practices of commercial operators * * *."

This court too recently refused to hold that seamen had lost the rights they enjoyed as employees of the private corporations acting as general agents, merely because the Government possesses financial and managerial control. The Court declared that such basic rights were not subject to radical alteration without clear and convincing evidence of congressional intent to bring this about. *Hust* v. *Moore-McCormack*, supra. It is a reasonable assumption that many of the doubts expressed by the War Shipping Administration concerning the jurisdiction of the National Labor Relations Board over the employees of general agents have been removed by the *Hust* case.

The Effect of an Affirmance of the Decision Below

If the opinion of the District Court is permitted to stand, it prepares the way for an upheaval in labor relations. The Government, through its instrumentalities, would assume the power of a censor in all labor disputes. Ready to its hand would be the broad sanctions available to a court of equity to which resort could be had in almost every instance.

The District Court did not rest its determination upon government ownership. It did not find that the miners were employees of the United States. The record, indeed, would not have justified any such support for the decision. The direct interest of the United States as a plaintiff is tenuous—a naked, constructive possession in which all the proprietary interests of the mine owners are preserved. Yet this was deemed sufficient to enable the Government to disrupt the endeavor by the mine employees to obtain an improvement in their conditions of employment.

If the Government's tangential interest in the mines was sufficient to give it status before a court, then its real interest in other industries invites similar action there. The Reconstruction Finance Corporation has billions invested. The Maritime Commission is the real owner of the merchant marine. It is difficult to think of a major industrial enterprise in which the United States does not have an important financial investment. As mortgagee in some instances, as owner in others, a court of equity would obviously protect its rights.[28]

A private ship operator could not obtain from the District Courts an injunction in a labor dispute. The Maritime Commission, however, could protect its investment, especially in so vital an industry as shipping. The right

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[28] *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362; *Consolidated Water Co.* v. *City of San Diego*, 84 Fed. 369; *Benson* v. *City of San Diego*, 100 Fed. 158.

to strike and the right to picket would be enjoyed only by sufferance. It is difficult to come to another conclusion in light of the decision of the District Court.

The Decision Below Is in Conflict with the Public Policy of the United States

The public policy of the United States in labor disputes is expressed in Section 2 of the Norris-LaGuardia Act.[29] It is there recognized that the use of the injunction in labor disputes is destructive of basic human rights; it speaks of the need to protect the right to "exercise actual liberty of contract and to protect the freedom of labor".

In the face of this clear expression, the District Court was in error in applying the doctrine of sovereign exemption. There are well defined exceptions to the rule.[30]

> "As where the statute is passed for the general advancement of learning, morality and justice, or to prevent fraud, injury and wrong, or where an Act of Parliament gives a new estate or right to the King, as in that case it will bind him as to the manner of enjoying or using the estate or right as well as the subject." *United States* v. *Herron*, 87 U. S. 251, 255, 256 (1874).

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[29] Tit. 29 U. S. C. A. sec. 102. See also *Lauf* v. *Shinner*, 303 U. S. 323; *Levering & Garrigues Co.* v. *Morrin*, 71 Fed. (2nd) 284, cert. den. 293, 595.

[30] That rule is moreover only applicable in cases where resort to a remedy which would otherwise be available is restricted. The typical instances are statutes of limitations, discharges in bankruptcy, and the like. *Nardone* v. *U. S.*, 302 U. S. 379, 383; *U. S.* v. *Herron*, 87 U. S. 251. It has never been applied to create a right which otherwise would not exist. The Norris-LaGuardia Act does more than restrict private litigants; by it Congress, acting within its Constitutional powers, has taken from the Court the power to grant the relief. The kind of statute to which the sovereign exemption principle has been applied imposes disabilities upon litigants; this statute has imposed a limitation upon the court. Even assuming that a remedy was within the reach of the United States in a situation as is described in the findings, the District Court of the United States was without power to grant it. *Lauf* v. *Shinner*, supra.

It would be somewhat difficult to think of a statute more concerned with "morality and justice" than the Norris-LaGuardia Act. It put an end to abuses which were stultifying the efforts of employees to achieve equality of bargaining power with their employers. It gave content to freedom of contract for workers. To suggest that the United States is not to be controlled by its own public policy so vigorously described is to make a mockery of the legislative function.

CONCLUSION

The decision below should be reversed.

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